David A. Bricklin, ISB No. 8565
Zachary K. Griefen, WSBA No. 48608
Bricklin & Newman, LLP
123 NW 36th Street, Suite 205
Seattle, WA 98107
Telephone: (206) 264-8600
bricklin@bnd-law.com
griefen@bnd-law.com
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PARADISE RIDGE DEFENSE COALITION,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; DORAL HOFF in his official capacity as District Engineer for Idaho Transportation Department District 2,

Defendants.

NO. 1:22-cv-00122-BLW

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

TABLE OF AUTHORITIES

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

Statutes and Regulations — Page

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

I. INTRODUCTION

At the outset of this case, defendants asserted that each and every crossing of waters of the United States would permanently impact less than one-half acre of wetlands.[1] Defendants tried to prevent Paradise's consultants from verifying that—denying them access to public land at Site 1. A court order was required. ECF 27. Now, after Paradise's 2022 Wetland Report demonstrated than well over an acre of wetlands would be destroyed at Site 1,[2] the Corps has changed its tune. But not sufficiently so.

The Corps now agrees that the US-95 Thorncreek Road to Moscow project would destroy more than one-half acre of wetlands at Site 1. Accordingly, the Corps has suspended its verification of authorization under NWP 14, *but only for Site 1*. The Corps apparently intends to allow the rest of the project to proceed under the authorization of NWP 14. This is further error on the Corps' part, for two reasons.

First, the Corps' own regulations implementing the Clean Water Act are clear that if a portion of a project needs an individual permit, the Corps may not approve the rest of the project via a nationwide permit—unless the other portions have "independent utility." Where (as here) the various portions depend on each other for their utility, once one part needs an individual permit, the entire, integrated project is disqualified from the nationwide permit program. As the regulation states:

> [P]ortions of a larger project may proceed under the authority of the NWPs while the [District or Division Engineer] evaluates an

---

[1] As there is no dispute that wetlands along the proposed project's route are jurisdictional under the Clean Water Act, we use the term "wetlands" interchangeably with "waters of the United States" or "WOTUS."

[2] The 2022 Wetland Report erred on the side of caution in order to delineate and map only the highest probability wetland areas and intentionally *under-mapped* wetlands in Site 1. Plaintiff's Statement of Undisputed Material Facts ("Plaintiff's Facts"), ¶ 19.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

> individual permit application for other portions of the same project, *but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project.*

33 C.F.R. § 330.6(d) (emphasis supplied).

This entire project is just six miles long. The limited access highway would run from Thorncreek Road to the south side of Moscow. There are no intermediate towns served by the highway. There are no entrances or exits (apart from where the new route would depart from and rejoin what would become "Old US-95 Loop"). Site 1 is near the project's southern terminus. If the highway cannot be constructed at Site 1, IDT would have a gap in its new highway. There would be a four-lane divided highway to the southern end of the project, then a two-lane highway through Site 1. The new four-lane highway would then resume, anomalously, on the north side of Site 1 and continue five more miles to Moscow. Site 1 is integral to the project. The project makes no sense without it.

The project is intended to eliminate the last piece of two-lane road on US-95 in this area and to eliminate the bottleneck where four lanes reduce to two.[3] If the highway remains two lanes at Site 1, the bottleneck will remain and ITD will not be able to meet the project's purpose.[4]

The project also is intended to eliminate unsafe conditions on the existing highway.[5] Site 1 is one of the two "High Accident Locations" that the project is intended to fix through removing the two-lane bottleneck.[6] If the highway is not built at Site 1, this unsafe condition will remain and the project's purpose will not be met.[7]

---

[3] Plaintiff's Facts, ¶¶ 5–9.
[4] Plaintiff's Facts, ¶ 13.
[5] Plaintiff's Facts, ¶ 5.
[6] Plaintiff's Facts, ¶¶ 10–12.
[7] Plaintiff's Facts, ¶ 13.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

Second, it is likely that other wetlands were missed elsewhere along the route. A nearly one-acre wetland was missed at Site 1 because ITD's consultant was not looking for wetlands in all the right areas. The omitted wetland was found in an area where a certain soil (conducive to wetland formation) is at the bottom of a side drainage. That interrelationship of the right soil and a water source occurs not only at Site 1, but elsewhere along the route. Yet ITD's consultant did not look for wetlands in those areas. It is highly likely that the agencies' mistake at Site 1 was repeated at other project crossing sites. Verification of authorization under NWP should be suspended for the entire project until an adequate assessment is made of the presence of wetlands along the entire proposed new route for US-95.

II. LEGAL BACKGROUND

A. The One-Half Acre Threshold Under NWP 14

Originally, the "heart of this case" was whether any of the project's wetland impacts exceeded the 0.5 acre threshold of NWP 14. Mem. Dec. and Order (ECF 27) at 13. If the Project will impact more than one-half acre at one or more sites, then the project cannot be permitted under the general permit NWP 14 and must be permitted (if at all) under an individual permit.

The distinction between individual and general permits under the Clean Water Act is described in *Crutchfield v. U.S. Army Corps of Engineers*, 154 F. Supp. 2d 878 (E.D. Va. 2001) (discussed in detail *infra*):

> Nationwide permits (NWPs), the sort authorized for the County and at issue here, are nationwide general permits that "are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). At the risk of oversimplification, NWPs are issued to allow conduct of a class of activities that the Corps has studied that, either because of the nature of the activity or the small reach of its impact, have sufficiently minimal impact as to justify bypassing the stricter regulatory review given applications for individual permits.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

> In contrast, standard individual permits require compliance with "public interest review procedures, including public notice and receipt of comments." 33 C.F.R. § 325.5(b)(1). This public interest review involves an evaluation of "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." 33 C.F.R. § 320.4(a)(2)(ii).

Crutchfield v. U.S. Army Corps of Engineers, 154 F. Supp. 2d 878, 893–94 (E.D. Va. 2001). *See also*, *Sawtooth Mountain Ranch LLC v. United States*, No. 1:19-CV-00118-CWD, 2022 WL 562612, slip op. at *17 (D. Idaho Feb. 24, 2022) (Dale, J.); ECF 27 at 2–4.

Under NWP 14, "activities having minimal impacts" means activities that will not result in an impact on waters of the United States greater than 0.5 acre at any one site. 82 FR 1860-01 ("[i]n [NWP 14], we are retaining the ½-acre limit for losses of non-tidal waters of the United States and the ⅓-acre limit for losses of tidal waters of the United States").

B. The Independent Utility Rule in 33 C.F.R. 330.6(d)

Now that the Corps has acknowledged that at least one site exceeds the half-acre threshold,[8] a new issue has taken center stage—whether the remainder of the project has independent utility, such that it is permissible for work on the remainder to continue while the Corps re-evaluates Site 1 through the individual permit program. The method for making this decision is addressed in the Corps' regulations.

In some cases, a large project might have portions that qualify for coverage under NWP 14, while other portions of the project exceed the one-half acre threshold and cannot be authorized under NWP 14. In such a case, the Corps' Division or District Engineer ("DE") may permit the qualifying portions of the project to proceed under the general permit authorization while the Corps

[8] Plaintiff's Facts, ¶¶ 22–23.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

evaluates an individual permit application for the portions of the project that would impact more than one-half acre of wetlands. But this is subject to an important qualification: The general permit may be used for other portions of the project "only if portions of the project qualifying for general permit coverage have independent utility and are able to function or meet their purpose independent of the total project." 33 C.F.R. 330.6(d). The full text of the rule is set out in the note.[9]

Conversely, if the portions of the project that qualify for coverage under NWP 14 depend on the nonqualifying portion of the project for their utility and would not be fully justified if the Corps were to deny the individual permit, the general permit may not be used; all portions of the project must be evaluated as part of the individual permit process. 33 C.F.R. 330.6(d). Further, in the context of evaluating all portions of the project under the individual permit process, the various portions must be evaluated together, not piecemeal: "All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement." 33 C.F.R. § 325.1(d)(2).

---

[9] **33 C.F.R. § 330.6 Authorization by nationwide permit.**

(d) Combining nationwide permits with individual permits. Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

(1) When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.

(2) NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

The "independent utility" rule in 33 C.F.R. 330.6(d) was addressed in *Crutchfield, supra.* There, the Corps had verified a county's construction of a wastewater treatment plant, discharge force main, and outfall under Nationwide Permits (in that case, NWP 26 for the treatment plant, NWP 12 for the force main, and NWP 7 for the outfall). *Crutchfield*, 154 F. Supp. 2d at 880; 889. But the county also sought a permit for an interceptor sewer (the "TC Interceptor"). The Corps and the county took the position that the treatment plant, discharge force main, and outfall had independent utility and could be evaluated under the NWPs while leaving the evaluation of the TC Interceptor for a later time. *Id.* at 891.

Under 33 C.F.R. 330.6(d), the *Crutchfield* plaintiffs challenged the Corps' decision on two grounds:

> First, they argue that the WWTP [treatment plant], force main, and outfall do not have utility independent of the TC Interceptor, and therefore can be permitted, if at all, only through an individual permit rather than through an NWP. Second, Crutchfield and Broaddus argue that the NWPs for the WWTP, force main, and outfall were allowed to proceed before the Corps received an individual permit application for the TC Interceptor, not "while" the Corps evaluated the individual permit application that the County made for the TC Interceptor after the Corps verified the use of NWPs for the WWTP, force main and outfall. Therefore, say the Plaintiffs, even if the WWTP, force main, and outfall had independent utility, they could not lawfully have received NWP verification until the County had submitted an individual permit application for the TC Interceptor.

Id. at 895–96 (internal footnote omitted). The court ruled for plaintiffs on both grounds.

On the first ground (that the various components of the county's system were interrelated and the treatment plant, force main, and outfall did not have independent utility), the court found "the plain text of the regulation, as applied to the record, rather clearly forecloses a rational determination that the [treatment plant], force main, and outfall have utility independent of the TC Interceptor." *Id.* at 896. The court reiterated that "the regulation requires that the portions of the

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

project sought to be authorized under an NWP (here the [treatment plant], force main and outfall) be 'able to function or meet their purpose independent of the total project.' 33 C.F.R. § 330.6(d)." *Id.*[10] The *Crutchfield* court then noted that the "undisputed record here is that the [treatment plant] cannot function at all unless sewage is transported to it by an interceptor. It is also undisputed that the force main and outfall have no function without the [treatment plant]." *Id.*

Apropos to the case before this Court, the *Crutchfield* court analogized to a highway case:

> In some situations the relationship of several roads or parts of road may be so interrelated that no one road or part of a road can function as an efficient carrier of motor vehicles except in conjunction with the others. In such a case, it is possible that it would be necessary to have an EIS which would have as its subject all of the roads or parts of roads which could only function efficiently as a unit. In such an unusual situation, the several roads would not constitute a system of highways but would be treated essentially as a single highway for the purpose of the EIS.

Id. at 902 (*quoting Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1384 (D. Md. 1973), *aff'd,* 500 F.2d 29 (4th Cir. 1974)).[11] The court described as "irrational" the Corps conclusion that the various project components could function apart from each other and had independent utility. *Id.* at 896. The court dismissed the agency's argument to the contrary as "a belated contrivance of expediency" that was "at odds with reality" and a "classic post-hoc rationalization of counsel which provides no ground for supporting the agency's decision." *Id.* at 897, 900. The court found that "the Corps' finding of independent utility is not a rational one. It

---

[10] *See also Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) ("We apply an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration in a single EIS. The crux of the test is whether 'each of two projects would have taken place with or without the other and thus had "independent utility." ' *Wetlands Action Network,* 222 F.3d at 1118 (internal quotations and citation omitted). When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not 'connected' for NEPA's purposes. *Native Ecosystems Council,* 304 F.3d at 894.").

[11] As *Crutchfield* acknowledged, the cited case arose under the National Environmental Policy Act (NEPA) and utilized NEPA's "segmentation" concept which is analogous to the Corps' independent utility analysis.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

cannot withstand even the deferential review to which it is entitled." *Id.* at 900. Accordingly, the court ruled:

> For the foregoing reasons, the [treatment plant] and the associated force main and outfall are not "able to function or meet their purpose independent of the total project[,]" which, since the 1970s, has included the TC Interceptor. 33 C.F.R. § 330.6(d). The "functioning or usefulness" of the [treatment plant], force main, and outfall are "dependent on the remainder of the project," the TC Interceptor, "such that [their] construction and use would not be fully justified even if the Corps were to deny the individual permit." 33 C.F.R. 330.6(d). The Corps' decision to the contrary is arbitrary, capricious and not in accordance with law.

Id. at 903.

The *Crutchfield* plaintiffs' second argument under 33 C.F.R. 330.6(d) was that the NWPs for the treatment plant, force main, and outfall were allowed to proceed *before* the Corps received an individual permit application for the TC Interceptor, not "while" the Corps evaluated the individual permit application as required by 33 C.F.R. 330.6(d). The court acknowledged that "33 C.F.R. § 330.6(d) allows portions of a project having independent utility to proceed under an NWP while the Corps evaluates an individual permit application for the other portions of the project[,]" *id.*, but ruled in plaintiffs' favor both because the "the Corps verified the NWPs before the County even submitted an individual permit application for the TC Interceptor" and because "the [treatment plant], force main, and outfall do not have independent utility from the TC Interceptor[.]" *Id.* at 904.

III. ARGUMENT

A. Standard of Review

"Because the Clean Water Act does not articulate its own standard of review, [courts] review agency action pursuant to the Administrative Procedures Act." *City of Olmsted Falls, Ohio*

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

v. U.S. Env't Prot. Agency, 435 F.3d 632, 636–37 (6th Cir. 2006). Under the Administrative Procedures Act ("APA"), a court must "set aside" agency action made without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

Courts "may set aside agency action if [they] find it to be without observance of procedure required by law" under 5 U.S.C. § 706(2)(D). *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974). The reviewing court "must decide whether the agency observed the 'procedure required by law' (5 U.S.C. s 706(2)(D))." *Yong v. Reg'l Manpower Adm'r, U. S. Dep't of Lab.*, 509 F.2d 243, 246 (9th Cir. 1975). *See also Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031, 1048 (D.C. Cir. 1979) ("in the area of traditional judicial preeminence, that of determining pure questions of law, Congress commanded an exacting judicial scrutiny"); *cf. Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995) ("it makes sense to distinguish the strong level of deference we accord an agency in deciding factual or technical matters from that to be accorded in disputes involving predominantly legal questions. [For questions that are] predominantly . . . legal rather than . . . factual, we hold that the applicable standard of review in this case is reasonableness.").

Deference to the agency's interpretation of its own regulation may be allowed, but only when the regulation is ambiguous. *Minnick v. Comm'r*, 796 F.3d 1156, 1159 (9th Cir. 2015) ("If the meaning of the regulation is clear, the regulation is enforced according to its plain meaning"); *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 392 (9th Cir. 2011), *aff'd,* 567 U.S. 142, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012) ("if the language of a statute or regulation is unambiguous, we apply the terms as written"). Even then, the Court should reject the agency's construction if it is "plainly erroneous or inconsistent with the regulation." *Id.* (quoting and citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911, 137 L. Ed. 2d 79 (1997)).

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

The familiar arbitrary and capricious standard for factual issues is deferential, but still requires a "searching and careful" examination of the facts; the court must engage in a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). "A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861, 104 L. Ed. 2d 377 (1989). *See also Northern Spotted Owl v. Hodel,* 716 F.Supp. 479, 482 (W.D. Wash. 1988) ("[j]udicial deference to agency expertise is proper, but the Court will not do so blindly"). An agency action is arbitrary and capricious "if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *W. Radio Servs. Co. v. Espy,* 79 F.3d 896, 900 (9th Cir.1996).

> [T]o withstand review, "[t]he agency [ ] must articulate a rational connection between the facts found and the conclusions reached." *Earth Island Inst. v. U.S. Forest Serv.,* 442 F.3d 1147, 1156–57 (9th Cir.2006). We will defer to an agency's decision only if it is "fully informed and well-considered," *Save the Yaak Comm. v. Block,* 840 F.2d 714, 717 (9th Cir.1988) (internal quotation marks omitted), and we "will disapprove of an agency's decision if it made 'a clear error of judgment,'" *West v. Sec'y of Dep't of Transp.,* 206 F.3d 920, 924 (9th Cir.2000) (quoting *Marsh,* 490 U.S. at 378, 109 S.Ct. 1851).

Sierra Club v. Bosworth, 510 F.3d 1016, 1023 (9th Cir. 2007).

B. The "Independent Utility" Rule in 33 C.F.R. 330.6(d) Requires Suspension of All Project Activities

The Corps should have suspended its verification of authorization under NWP 14 for the entirety of the US-95 Thorncreek Road to Moscow project, not only for Site 1. The independent

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

utility rule at 33 C.F.R. § 330.6(d) compels the Corps to suspend verification for the entire project, because the other portions of the project (which are currently under construction) have no independent utility and serve no function without Site 1—without Site 1, the remainder of the project leaves in place the same bottleneck that the project was intended to remove. The remaining portions of the project depend on Site 1 for their utility.[12]

Now that the Corps has finally agreed with plaintiff, acknowledged that the project would impact more than one-half acre of wetlands at Site 1, and suspended authorization for Site 1, there is no Clean Water Act permit coverage for Site 1. Nor is there (to plaintiff's knowledge) a pending application for permit coverage at Site 1. Therefore, as in the *Crutchfield* case, the Corps is allowing construction of the highway portions north of Site 1 to proceed *before* the Corps receives an individual permit application for Site 1, not *while* the Corps evaluates the individual permit application for Site 1 as required by 33 C.F.R. 330.6(d). The Corps has taken action without observance of the procedure required by law, and so that action should be set aside. *Idaho Sporting Cong., Inc. v. Alexander,* 222 F.3d 562, 567–68 (9th Cir. 2000).

Furthermore, the agencies' errors and omissions at Site 1 are likely repeated at other crossing sites along ITD's proposed route. Originally, plaintiff had focused on, and sought entry onto, Site 1 because the difference between the half-acre acre wetland impact limit of NWP 14 and defendants' asserted wetland impacts at Site 1 of 0.468 acres was so small that any error in the agencies' wetland delineation could have made the difference between NWP applying, or not applying, to the US-95 Thorncreek Road to Moscow project.

[12] Plaintiff's Facts, ¶ 13.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

But now we know not only that the half-acre threshold is exceeded at Site 1, but that the same methodological flaw that caused the agencies to miss the Site 1 wetland was repeated all along the route.[13] The Site 1 wetland was missed because ITD's consultant did not consider the significance of side drainages above wetland-conducive soils at Site 1 and—critically—the consultant repeated that error along the entire route.[14]

The defendants know, or should know, that the error is likely repeated outside of Site 1, because the "landform and associated hydrology that Resource Planning Unlimited overlooked at Site 1 occurs elsewhere along the proposed highway route, too."[15] "There are numerous sub-basins draining toward areas of the Latahco-Thatuna Soil Complex along the proposed project's route that could create wetlands like the ones we identified at Site 1."[16] Just as ITD's consultant missed a nearly one-acre wetland at Site 1, it likely missed other wetlands along the project route.[17] ITD's consultant's work "cannot be considered reliable, accurate, thorough, or sufficient."[18]

This Court's ultimate review is of the federal agency's decision. Here, the Corps clearly failed to consider all relevant factors regarding the extent of the project's wetland impacts. While the Corps has now acknowledged its error at Site 1, it refuses to address it at other sites, even though the same conditions that created the nearly one-acre wetland at Site 1 occur elsewhere along the project route. The Corps' decision to suspend authorization for only Site 1 is not fully informed and well-considered. The Corps is failing to consider an important aspect of the problem. In the words of the APA, the Corps' decision is arbitrary and capricious.

---

13 Plaintiff's Facts, ¶ 25, 27.
14 *Id.*
15 Plaintiff's Facts, ¶ 25.
16 Plaintiff's Facts, ¶ 27.
17 *Id.*
18 Plaintiff's Facts, ¶ 26.

Bricklin & Newman, LLP
Attorneys at Law
123 NW 36th Street, Suite 205
Seattle, WA 98107
Tel. (206) 264-8600

The verification of authorization under NWP 14 for the entirety of the US-95 Thorncreek Road to Moscow project should be suspended until a reliable, accurate, thorough, and sufficient analysis is completed showing the real extent of destruction of waters of the United States that would be caused by the project. The suspension should happen now, before ITD—which continues to engage in work on the project despite the new findings—destroys the very wetlands that the Clean Water Act is intended to protect and that the Corps is charged with protecting.

IV. RELIEF REQUESTED

Plaintiff respectfully requests that this Court order the Corps to immediately suspend its verification of authorization under NWP 14 for the entirety of the US-95 Thorncreek Road to Moscow project, order defendant Hoff to immediately withdraw ITD's application for coverage under NWP 14, and order Hoff to immediately stop work on the entire project.

Dated this 15th day of August, 2022.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: *s/David A. Bricklin*
By: *s/Zachary K. Griefen*

David A. Bricklin, ID Bar No. 8565
Zachary K. Griefen, WSBA No. 48608*
123 NW 36th Street, Suite 205
Seattle, WA 98107
Telephone: 206-264-8600
E-mail: bricklin@bnd-law.com
E-mail: griefen@bnd-law.com

Counsel for Plaintiff Paradise Ridge Defense Coalition

*Attorney Griefen is admitted *pro hac vice*.